

On Checklist Item No. 7—911/E911, Directory Assistance, Operator Services—AT&T did not make a specific recommendation for changes to proposed SGAT language, but only asks Qwest “to clarify how it intends to use [UNE] forecasts and whether it intends to build trunk to meet the CLECs’ forecasted demands.” AT&T can ask Qwest directly for such clarification, and thus the Commission will not approve any changes to the facilitator’s recommendations for Checklist Item No. 7.

Regarding Checklist Item No. 8—Directory Listings—AT&T requested the Commission approve a wording change to SGAT Sections 10.2.4.24 and 10.2.4.25. AT&T noted that the facilitator approved adding the word “contractor” after the word “affiliate” for Section 10.2.4.26, and argued that the same change should be made for the other two sections for “consistency and continuity.” The Commission agrees, and thus approves adding the word “contractor” to Sections 10.2.4.24 and 10.2.4.25. There are no other disputed issues in regard to Checklist Item No. 8.

AT&T also raised issues regarding Checklist Item Nos. 11 and 13. Checklist Item No. 11 is Local Number Portability (LNP). To satisfy the LNP requirement, AT&T states Qwest “must demonstrate that it provides LNP with minimum service disruptions and without impairment of quality.” AT&T Comments, p. 3. The facilitator recommended specific changes to the SGAT on this issue, and stated “upon making the changes, Qwest can be deemed to have met its burden of proof, subject to the completion and commission consideration of the results of any OSS testing that may relate to this item.” AT&T disagrees that the changes recommended by the facilitator “are sufficient to put Qwest in compliance with Checklist Item 11,” and argues that “[u]ntil Qwest demonstrates satisfactory performance in provisioning LNP, Qwest should not be deemed to be in compliance with Checklist Item No. 11.” AT&T Comments, p. 4.

The Commission agrees in principle with AT&T’s argument, but also agrees with the facilitator’s recommendation. The SGAT language for LNP may be sufficient, but the SGAT itself does not demonstrate that Qwest is actually providing LNP as required. The OSS test results will provide important information regarding the performance of Qwest on this and many other issues. If the OSS test results demonstrate Qwest is not able to provide LNP “with minimum service disruptions and without impairment of quality,” the Commission will not recommend to the FCC that Qwest meets the requirements of Checklist Item No. 11.

The final issues presented by AT&T relate to Checklist Item No. 13, Reciprocal Compensation. The Commission is aware of, and AT&T refers to, some of the litigation over reciprocal compensation, as well as the FCC's shifting position on this issue. The facilitator also was mindful of the guidance provided by the FCC, including its latest order issued April 27, 2001. The Commission has reviewed AT&T's arguments on this issue, and for present purposes of Qwest's SGAT, is satisfied with the recommendations made by the facilitator. The Commission also believes issues of reciprocal compensation should be brought to the FCC, and AT&T will have an opportunity to raise the issue when the FCC is considering Qwest's Section 271 application.

CONCLUSION

The Commission is prepared, when consulted by the FCC, to report that Qwest satisfies the access and interconnection requirements of the competitive checklist in 47 U.S.C. § 271(c)(2)(B), so long as Qwest revises its SGAT as set forth in this decision and as may be necessary as this case proceeds to its conclusion. The Commission's final recommendation to the FCC also will depend on the final development of Qwest's QPAP, on the successful completion of the OSS test process, and on final resolution of all issues relating to Track A, public interest, Section 272 and general terms and conditions.

It is clear, upon review of the extensive record resulting from the workshops and the facilitator's lengthy reports, that all parties involved in this case have made tremendous contributions to the process. The Commission is particularly pleased with the careful analysis employed by the facilitator to resolve very technical disputes. The Commission supports the continued cooperation and diligent efforts of the parties as they proceed through this complicated case.

DATED at Boise, Idaho this

day of November 2001.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

Vld/O: USW-T-00-3_ws

EXHIBIT B

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF U S WEST)	
COMMUNICATIONS, INC.'S MOTION FOR	)	CASE NO. USW-T-00-3
AN ALTERNATIVE PROCEDURE TO)	
MANAGE ITS SECTION 271 APPLICATION.	)	COMMISSION DECISION ON
	)	QWEST'S PERFORMANCE
	)	ASSURANCE PLAN
)	

BACKGROUND

In 1984, local exchange telephone companies divested by AT&T and referred to as Bell Operating Companies (BOCs) were barred from providing long-distance services outside specific Local Access Transport Area (LATA) boundaries. The Telecommunications Act of 1996 allows that restriction to be lifted by the Federal Communications Commission (FCC) if a BOC meets certain requirements specified in Section 271 of the Act. For example, Section 271(c)(2)(B) contains terms for access and interconnection to its network a BOC must provide to competitor telecommunication companies. The FCC must also find that the BOC request "is consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C).

The FCC evaluates the BOC's satisfaction of the access and interconnection and other requirements at the time the BOC's application is filed, and the Act does not call for ongoing review by the FCC once it grants interLATA authority to the BOC. Accordingly, to insure the BOC continues to satisfy the Section 271 requirements, the FCC has determined the public interest may require the BOC to have a Performance Assurance Plan (PAP or Plan) in place.¹ A PAP provides specific standards for the BOC's delivery of services to competitor telecommunications providers and automatic penalties if the standards are not met.

The development and review of Qwest's Plan (QPAP) began in earnest in August 2000 in a collaborative process created by the Regional Oversight Committee (ROC). The ROC is comprised of representatives of the state commissions that oversee Qwest's local exchange service. The ROC collaborative process included five workshops, numerous conference calls

¹ The parties and Commission have used the acronym QPAP for either "Quality Performance Assurance Plan" or "Qwest Performance Assurance Plan," see Order No. 28788. Hereafter, PAP will refer to Performance Assurance Plans in general, and QPAP will refer to Qwest's PAP.

and exchanges of proposals, supporting data, and other information designed to seek the creation of a consensus PAP. The ROC process terminated in May 2001, with many significant issues resolved by consensus, but also with many issues remaining unresolved.

Qwest thereafter on July 16, 2001, filed its Plan with this Commission, stating it "is voluntarily submitted for the purpose of demonstrating to the [FCC] that Qwest will have compelling economic incentive to continue meeting the requirements of Section 271 after it obtains approval to offer long distance services in the state." Qwest's Filing of QPAP p. 1. Thus, despite disagreement over some of the Plan's terms by other telecommunications companies and Qwest competitors, Qwest was apparently satisfied its Plan would pass muster with the FCC. Rather than let the Plan stand as filed, however, the Commission determined, "along with the other states in the Section 271 proceeding, to include evaluation of the QPAP in the Section 271 process." Order No. 28788, issued July 23, 2001. The Commission asked the Facilitator coordinating the multi-state Section 271 case to receive evidence and conduct hearings on the Plan, and provide a written report to the state commissions. In this way, evaluating the QPAP "as part of the Section 271 requirement will provide a record for the FCC to determine whether Qwest has satisfied the public interest requirements for Section 271 approval." Order No. 28788, p. 3.

Pursuant to the schedule adopted by the Commission, the Facilitator conducted hearings, received written comments and briefs, and filed his QPAP report in October 2001. After written comments on the report were filed, the Commission on November 9, 2001, issued a notice that the QPAP report and comments had been filed. On January 3, 2002, the Commission issued a Notice of Hearing on Oral Argument for the QPAP, which convened on January 24, 2002.

THE FACILITATOR'S REPORT

The Facilitator in his report described the ROC collaborative process that preceded inclusion of the QPAP in this case. The Facilitator found the ROC QPAP proceeding to be "comprehensive, well conducted, subject to wide participation, and thorough in addressing the broad range of issues and subjects appropriate to a post entry plan expected by the FCC." QPAP Report, p. 2. The Plan blueprint put forward by Qwest in the ROC proceeding was the PAP approved by the FCC for Southwestern Bell in its Section 271 application for Texas. The Facilitator identified significant changes agreed to in the ROC collaborative, noting that the

QPAP was changed “significantly and positively to address discussions occasioned by that collaborative.” QPAP Report, p. 4.

The Facilitator identified the standard of review provided by the FCC for its evaluation of Plans, described as a “zone of reasonableness” standard. According to the reasonableness test, a plan should meet five characteristics:

Meaningful and significant incentive to comply with designated performance standards.

Clearly articulated and predetermined measures and standards encompassing a range of carrier-to-carrier performance.

Reasonable structure designed to detect and sanction poor performance when and if it occurs.

Self-executing mechanism that does not open the door unreasonably to litigation and appeal.

Reasonable assurance that the reported data are accurate.

QPAP Report, p. 4.

To further clarify review of a plan for meeting the objectives identified by the FCC, the Facilitator also stated eight questions for consideration in a plan review:

Does it comport with the cornerstone elements common to previous plans existing under approved 271 applications?

Do the gives and takes that distinguish it from those other plans balance out on a net basis?

Does the Plan provide adequate compensation for actual harm for which CLECs could reasonably expect to be compensated if their relationship with Qwest were more typical of commercial arrangements of similar size, complexity, and mutual risk and opportunity?

In the final analysis, will the Plan (considering not just those elements designed to compensate CLECs for harm) provide sufficient incentive for Qwest to ‘continue to satisfy the requirements of Section 271 after entering the long-distance market’ as the FCC put it in ¶ 275 of the SBC Kansas/Oklahoma order, after it may receive 271 approval?

Will the Plan provide that incentive in a manner that does not place any more strain than is necessary on the sound principal that damages should bear a reasonable relationship to harm caused?

Do the incentive aspects of the Plan (i.e., costs that go beyond the compensating CLECs for actual harm) impose a price on in-region, inter-LATA entry that it would be irrational for a BOC to pay for the privilege for such entry, recognizing that the range of expected values of potential payments, not a theoretical maximum with minimal likelihood of occurring, is much more meaningful?

Does the Plan adequately respond to any unique circumstances proven by the evidence to be applicable here?

Are there administrative or procedural details in the Plan that are not sufficiently functional, and that can be repaired without a major shift in balance?

QPAP Report, p. 6.

With this standard of review in mind, and after considering the evidence presented, the Facilitator recommended changes to the QPAP in 29 different sections. Among the more significant changes, the Facilitator recommended allowing movement of the cap on the total financial exposure to Qwest, establishment of a QPAP administration process accessible to multiple states, and providing for minimum payment penalties to CLECs with annual order billing of less than 1,200. With the changes recommended in his 88 page report, the Facilitator is satisfied the QPAP meets the FCC's zone of reasonableness standard.

THE PARTIES' WRITTEN COMMENTS

Written comments in response to the Facilitator's Report were filed at the Commission by Qwest, AT&T, WorldCom, Covad, and the Commission Staff. Qwest called its comments "Errata and Replacement Filing," indicating its acceptance of, if not agreement with, nearly all of the recommendations made by the Facilitator in his report. Qwest addressed each of the recommendations and stated how it was addressed in the latest QPAP, which Qwest filed with its comments. Qwest argued in conclusion that its QPAP, improved by CLEC negotiations and state Commission Staff recommendations, "is more than sufficient to meet the FCC's expectations and assure that FCC approval of Qwest's Application for 271 relief is in the public interest." Qwest Comments, p. 17.

The Commission separately discusses issues addressed by the commenters and makes its findings in the following section of this decision. Recommendations made in the

Facilitator's report that were not disputed or are not specifically addressed by the Commission in this decision are adopted by the Commission.

DISCUSSION OF DISPUTED ISSUES

1. Meaningful and Significant Incentive (QPAP Report, pp. 12-45). The QPAP as Qwest proposed it placed at risk no more than 36% of Qwest's annual net income from local exchange services in each state. For Idaho, that amounts to approximately \$24 million based on Qwest's 1999 ARMIS report for local services. The Facilitator recommended the cap be allowed to increase four percentage points upon order of the Commission in cases where the cap would have been exceeded for any consecutive period of 24 months. The Facilitator also recommended the cap be allowed to decrease the same amount by Commission order for any consecutive period of 24 months which produces calculation of total payments that is eight or more percentage points below the cap amount.

In their comments, AT&T, Covad and the Commission Staff recommended changes that affect the total payment liability represented by the 36% cap. Staff and Covad recommended the data on which the cap amount is based be updated and not fixed to the 1999 ARMIS report. AT&T argued that the 36% cap is inadequate and should be raised to at least 44% of net revenue from Qwest's local service, and in any event, that the cap should not be allowed to reduce below 36%. Covad also argued that the 36% cap "will result in under compensation of CLECs." Covad Comments, p. 5.

The Commission approves the recommendation made by the Facilitator for a 36% cap, with the possibility that it will increase after a Commission determination based on a 24-month performance period by Qwest. The Facilitator and the parties recognize that the FCC has approved Plans that contain a 36% net revenue cap on the aggregate amount for penalties that might be incurred by the BOC. Thus it is difficult for this Commission to conclude that a similar cap on the potential liability for Qwest does not meet the FCC's zone of reasonableness test. In addition, it is possible for the cap to increase if Qwest fails to provide adequate service to the CLECs. Finally, the QPAP will be reviewed six months after it becomes effective and again at two years from its effective date. Those reviews will enable the Commission to evaluate the continued propriety of the QPAP cap at that time.

The Commission agrees with the comments of Covad and Staff, however, regarding the currency of information on which the cap is based. The cap amount should be revised each year based on the Company's most recent report of net intrastate revenues for Idaho.

a. Compensation for CLEC Damages. Pages 26 through 36 of the QPAP report address compensation for CLEC damages, including whether an objective of the Plan and its penalties is to compensate CLECs for actual damages that might result from Qwest's poor performance. Related issues are the question of compensating CLECs for contractual damages, whether it is appropriate for the QPAP to liquidate such damages, whether CLECs need to provide evidence of actual harm, whether the QPAP should preclude other CLEC remedies in exchange for automatic penalty provisions, and whether Qwest should be allowed to make an offset of damages by an amount paid from the QPAP provisions. These issues were addressed by AT&T and Covad in their comments.

In his review, the Facilitator discussed applicable provisions in the Texas PAP and in a special master report prepared for the Colorado PAP. Those provisions allow for limiting recovery of damages based on contract theories of action when a CLEC has been compensated by payments resulting from the PAP. A CLEC that elects PAP remedies would not be precluded from seeking recovery from non-contractual theories of liability, for example, by federal enforcement under Section 271(d)(6), or anti-trust, tort and consumer protection remedies.

The Commission finds that the recommendations by the Facilitator on these points are appropriate. The Commission is not convinced, however, that the right of offset provided to Qwest in the QPAP is appropriate because it grants to Qwest too much authority to determine the offset. The Commission thus approves the following language adopted by the Colorado and Montana Commissions for the QPAP in those states:

If for any reason a CLEC agreeing to this QPAP is awarded compensation for the same harm for which it received payment under the QPAP, the court or other adjudicatory body hearing such claim may offset the damages resulting from such claim against payments made for the same harm.

b. Incentive to Perform. The QPAP is intended to provide the incentive for Qwest to perform at least on a level of set standards or measures, called Performance Indicator Definitions (PIDs), and provides for payments to the CLECs or states should Qwest fail to meet the set standards. Measures in the QPAP are divided between Tier 1, whose accompanying penalties

provide compensation to CLECs, and Tier 2, whose penalties derive to the states to fund administration of the QPAP, as discussed later in this decision.²

The issues under this heading in the report address the use of Tier 2 payments, a three month trigger for Tier 2 payments, limiting escalation of QPAP remedies to six months, and splitting Tier 2 payments between CLECs and the state. These issues were addressed by AT&T, Covad and the Commission Staff in their written comments. AT&T objected to the Facilitator's recommendation that a portion of Tier 1 payments may be used to help fund a special fund available for states participating in a common administration effort. AT&T and Staff objected to the three-month trigger for Tier 2 payments, recommending that Tier 2 payments be available for each month of non-compliance by Qwest. AT&T and Commission Staff disagreed with the Facilitator's capping of the escalation of QPAP penalties to six months, at which point the payment amounts would continue for continued bad performance, but would level out.

The Commission finds that Tier 1 payments for CLECs should not be used for administration provided by the special fund, and that all Tier 2 payments should be available for the special fund administration. Sections 11.3.1 and 11.3.2 of the QPAP must be amended to incorporate these changes. The Commission agrees with the Facilitator's recommendation that Idaho and other state commissions participate in a joint effort to oversee administration of the QPAP. Qwest has agreed to initially fund the special administration fund with \$500,000. That amount may be reduced if less than six states participate in the joint administration effort. Section 11.3.3 of the QPAP must be modified to reflect Qwest's commitment to deposit to the special fund. The Commission directs the Staff to pursue this matter with other state commissions participating in the multi-state Section 271 proceeding and propose a collaborative effort for administering the QPAP provisions. The Commission otherwise approves the Facilitator's recommendations on these points.

2. Clearly Articulated and Predetermined Measures (QPAP Report, pp. 46-59). Most of the comments in this category were made by Staff, whose primary recommendation related to allowing performance measures to be added or changed in the QPAP. Similarly, Covad argued that performance indicators "that are converted from a diagnostic status to a benchmark or a parity standard prior to Qwest receiving effective Section 271 relief will be

² Should the penalties from Tier 2 measures ever exceed the amount required to provide special fund administration, the Commission will then determine the best use of the excess funds.

incorporated in the QPAP.” Covad Comments, p. 19. WorldCom argued that measures for the provisioning of special access circuits should be included in the QPAP.

The Commission will not address each performance measure discussed by the parties, because the significant point is that the QPAP must have some flexibility both before and after it becomes effective. The Commission agrees that diagnostic measures that are converted to permanent measures should be so designated in the QPAP. The Commission also leaves open the possibility that completion of the ROC OSS test will result in proposed changes to some performance measures that should be incorporated into the Plan. Additionally, as will be further discussed, the Commission approves the QPAP’s provision for a review in six months to determine effectiveness of measurements and to allow for changes. The FCC in its review of the Texas PAP endorsed flexibility to make alterations, saying the “continuing ability of the measurements to evolve is an important feature because it allows the plan to reflect changes in the telecommunications industry and in the [state telecommunications] market.” We are satisfied the Facilitator’s recommendations for this part of the QPAP are appropriate, so long as measures are allowed to change prior to the effective date of the QPAP, and thereafter by the review process described in the Plan.

3. Structure to Detect and Sanction Poor Performance as It Occurs (QPAP Report, pp. 59-71). The comments by AT&T, Covad and the Staff regarding this section of the QPAP report addressed limitations on the review that will occur after six months, low volume critical values, and 100% caps of interval measures. The QPAP itself calls for a review six months after it becomes effective, but limits it to (1) the addition, deletion or changes of measurement, (2) change of benchmark standards to parity standards, (3) changes in weighting of measurements, and (4) movement of measures from Tier 1 to Tier 2. The Facilitator noted the Texas PAP contained similar limitations on the six-month review, thus preventing a general re-opening of the plan to amendment. The Facilitator also noted the more general review scheduled for three years after the effective date, and recommended the broader review instead occur at two years.

The Commission approves the limitations placed on the initial review at six months, except that the QPAP should leave open the possibility that the Commission may broaden the review if necessary to respond to circumstances arising from actual experience with the QPAP. In addition, Section 16.1 of the QPAP describing the six-month review does not permit changes without Qwest’s agreement. That language must be modified to state that Qwest will make

changes if the Commission so directs, whether Qwest agrees or not with the changes. The Commission approves the remaining recommendations made by the Facilitator for this section of the QPAP.

4. Self-Executing Mechanism (QPAP Report, pp. 71-86) and Other Issues (QPAP Report, pp. 86-88). AT&T in its comments briefly addressed issues covered in these portions of the QPAP, specifically recommending that (1) the interest rate applicable to any QPAP payments should be the rate set by a state commission or law rather than the prime rate, (2) the effective date for the QPAP should be the date Qwest files its Section 271 application with the FCC rather than the date its application is approved, and (3) the QPAP should state explicitly that Qwest will not be able to recover in rates the payments it makes under the QPAP. On the last point, the Facilitator stated, "neither the FCC nor the state commissions require guidance in how or when to determine what to do about QPAP payment recovery in rates."

The Commission concurs with the Facilitator's recommendations on these points. Because the QPAP eventually will be effective in several states, using one interest rate for payments where applicable will ease the administration burden, and the prime interest rate is appropriate for this purpose. Tying the effective date of the QPAP to the date Qwest achieves interLATA authority is logical because the QPAP is intended to measure and direct Qwest's performance once it receives Section 271 authority. Finally, we agree with the Facilitator that the QPAP need not state whether Qwest can seek recovery of QPAP payments in customer rates.

CONCLUSION

It is clear that Qwest and many other parties have significantly contributed to development of a QPAP to satisfy the objectives described by the FCC. The current QPAP began with a Plan already approved by the FCC, was tested and revised through a lengthy collaborative process, then was submitted for dispute resolution to the Facilitator, and finally was revised through comments and decision of this Commission. On this record the Commission believes the QPAP is well on its way to meeting the FCC's zone of reasonableness standard. The Commission is not yet prepared to recommend approval of the QPAP, however, because changes must still be made. First, Qwest must make the changes set forth in this decision. Second, Qwest must also allow for the change in QPAP measurements that might come from completion of the OSS test process. Finally, the Commission believes it is in Qwest's interest that the QPAP, to the extent possible, be uniform among all the states in its local service area.

The Commission accordingly directs Qwest and the Staff to monitor other state commission activity on the QPAP and report to this Commission significant changes ordered by other states. For example, according to supplemental comments filed by AT&T, the Montana and Wyoming commissions recently issued preliminary decisions on the QPAP, which may lead to changes to the QPAP that should be included in the Idaho Plan. The Commission will accept additional supplemental QPAP comments that are limited to recommending changes resulting from the OSS test or significant changes ordered by other participating state commissions.

DATED at Boise, Idaho this day of March 2002.

PAUL KJELLANDER, PRESIDENT

MARSHA H. SMITH, COMMISSIONER

DENNIS S. HANSEN, COMMISSIONER

ATTEST:

Jean D. Jewell
Commission Secretary

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EXHIBIT C

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF U S WEST)	
COMMUNICATIONS, INC.'S MOTION FOR	)	CASE NO. USW-T-00-3
AN ALTERNATIVE PROCEDURE TO)	
MANAGE ITS SECTION 271 APPLICATION.	)	COMMISSION DECISION ON
	)	QWEST CORPORATION'S
	)	COMPLIANCE WITH SECTION 271
	)	PUBLIC INTEREST AND TRACK A
	)	REQUIREMENTS AND SECTION
	)	272 STANDARDS

INTRODUCTION

When the Federal Communications Commission (FCC) reviews an application by a Bell Operating Company (BOC), which includes Qwest, for authority to provide interLATA telecommunication services, the FCC may not give its approval unless it finds "that the requested authorization is consistent with the public interest, convenience and necessity." 47 U.S.C. § 271(d)(3)(C). The FCC has determined the public interest standard in Section 271(d)(3)(C) requires a Performance Assurance Plan (PAP) that provides detailed performance standards for the BOC's delivery of services to competitor telecommunications providers and automatic penalties if the standards are not met. The Commission issued a decision on Qwest's PAP on March 7, 2002. This decision examines the public interest issues outside of the PAP.

The FCC must also find that "the requested authorization will be carried out in accordance with the requirements of Section 272." 47 U.S.C. § 271(d)(3)(B). Section 272 requires the BOC to provide interLATA services, once approved, through a separate affiliate independent from the BOC. 47 U.S.C. § 272(a) and (b). In this decision the Commission also reviews the record created on Qwest's compliance with Section 272.

Finally, the Commission in this decision addresses issues relevant to the dual tracks to interLATA approval set forth in Section 271(c)(1). Under Paragraph A of that section ("Track A"), Qwest may obtain interLATA authorization, assuming all other Section 271 requirements are met, if it "has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is

providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers.” In other words, Qwest must actually be providing access to its network to another telecommunications company pursuant to an approved interconnection agreement, and the other company must be providing service to residential and business customers. The Track B route to FCC interLATA authorization, Paragraph B of Section 271(c)(1), does not require actual interconnection between Qwest and another company’s facilities. Instead, Qwest must have a valid Statement of Generally Available Terms (SGAT) setting forth terms for other providers to interconnect to Qwest’s network and facilities. This decision, in addition to public interest and Section 272 standards, reviews the record on the Track A requirements and residual issues on Qwest’s SGAT.

BACKGROUND

On February 8, 2000, Qwest Corporation, formerly U S WEST Communications, Inc., filed a Notice of Intention to File a Section 271 Application and a Motion for Alternative Procedure to Manage the 271 Process. In response the Commission issued Procedural Order No. 28450 approving its participation in a multi-state workshop process to develop a record on Qwest’s compliance with the Section 271 requirements.

The seven states participating in the multi-state workshop process retained an outside Facilitator “to conduct a joint process to develop a factual record and consider aspects of Section 271 through collaborative workshops.” The Facilitator conducted workshops to receive evidence and establish a record to be filed in each state. The Facilitator was directed to prepare and submit a report on the agreed upon and unresolved issues in each workshop and make recommendations for the resolution of disputed issues.

The Facilitator filed two reports for the issues relevant to this decision. The first report was filed September 21, 2001, and addressed general terms and conditions for Qwest’s SGAT, Section 272, and Track A requirements. The second report was filed October 22, 2001, and addressed public interest issues, exclusive of the QPAP.

Interested parties were provided an opportunity to file written comments, including exceptions, with the Commission within ten days of the filing of the reports. Written comments were filed by Qwest, the Commission Staff, AT&T Communications of the Mountain States, Inc., and Touch America, Inc. The Commission established a hearing for oral argument on

December 3, 2001, notifying the parties that the oral argument would be “limited to Track A requirements, separate affiliate requirements of Section 272, general terms and conditions, and the public interest issues exclusive of the QPAP.”

GENERAL TERMS AND CONDITIONS

The general terms and conditions component of the Facilitator’s report and record refers to terms for Qwest’s Statement of Generally Available Terms (SGAT) for access and interconnection to its network. The competitive checklist in Section 271(c)(2)(B) sets forth 14 different standards for interconnection a BOC must meet and then provide in an SGAT to satisfy the Track B option of Section 271. The SGAT must contain terms beyond those required to address the 14 checklist standards, however, to answer administrative details for a complex business arrangement between two competitors. The general terms and conditions component was added to the workshop proceedings and Facilitator’s report when it became clear the topic was significant and included numerous issues the parties were unable to resolve by a consensus.

The Facilitator’s report filed September 21, 2001, addressed the general terms and conditions record, and identified 19 issues resolved through the workshops. Eighteen issues remained for resolution by the Facilitator, including SGAT language for resolving conflicts between the SGAT and other documents, and the ability of a competitor to opt in to other effective interconnection agreements with Qwest.

In its comments filed on general terms and conditions, Qwest stated, although it did not agree with all the proposed resolutions, it “will implement the [Facilitator’s] report in full and file SGAT language that complies with the report.” Qwest Comments p. 4. One issue was not resolved by the report, however, because “the record did not allow an assessment of Qwest’s compliance with FCC requirements applicable to change management process.” Facilitator’s Report Summary p. 6. Qwest’s comments state that discussions on the change management process (CMP) were still occurring and that the parties have “agreed to report on the progress of these discussions at later dates.” Qwest Comments p. 12. At the oral argument, Qwest stated the CMP “will be addressed in detail in the ROC OSS report, and Qwest does not believe there is anything further needed from this Commission until receipt of the ROC OSS Report.” Tr. p.110-111. The ROC OSS Report refers to the testing of Qwest’s operational support system (OSS) under the auspices of the Regional Oversight Committee (ROC). The final draft report is scheduled for filing on April 19, 2002.

In its written comments regarding general terms and conditions, Staff stated it “supports the Facilitator’s findings and recommends that this Commission adopt them as set forth in the report.” Staff Comments p. 3. The only other written comments regarding the general terms and conditions issues were filed by AT&T. AT&T in its comments first states a general complaint that the Facilitator’s report and the workshops on general terms and conditions “shift the burden of proof to the competitive local exchange carriers (CLECs) to prove Qwest’s non-compliance and completely ignores the fact that Qwest provided little or no evidence in support of its SGAT claims of compliance.” AT&T Comments p. 1. AT&T also asserts generally that the Facilitator’s report “highlights instances wherein the Facilitator ignores the law, misunderstands the SGAT language or speculates about facts not in evidence in the record.” AT&T Comments p. 3.

The Facilitator properly characterized the SGAT as “an offer for an agreement between Qwest and any requesting CLEC.” Facilitator’s Report p. 15. The general terms and conditions part of the SGAT governs the relationship between the CLEC and Qwest, but are themselves not part of the Section 271 checklist requirements. Facilitator’s Report p. 15. In this context, and without greater specificity in AT&T’s complaint, there is no basis for AT&T’s contention that the Facilitator shifted the burden of proof on the general terms and conditions. The Commission is generally well pleased with the Facilitator’s understanding and conduct of the workshop process, as well as the many complex issues involved.

AT&T also raised several specific objections to the Facilitator’s report on general terms and conditions. For example, AT&T argued its evidence shows that Qwest has not complied with certain “pick and choose” requirements in the Telecom Act. During the workshops AT&T presented evidence of Qwest’s dealings with AT&T in Wyoming, “showing Qwest’s abusive conduct of trying to make AT&T opt-into more and wholly unrelated contract provisions than were required or requested to obtain the particular interconnection provision needed.” AT&T comments p. 7. AT&T conceded “the SGAT language itself was not the problem,” and instead its complaint was on Qwest’s apparent business practice.

The Facilitator’s report reflects careful and thorough consideration of the issues raised by AT&T. The Facilitator either rejected or addressed these specific issues in proposing resolution to the general terms and conditions disputes. After reviewing the report and record, as

well as AT&T's written comments, the Commission is satisfied with the proposed resolution provided by the Facilitator on the issues identified by AT&T.

The Commission does approve, however, two specific recommendations made by AT&T. First, AT&T noted that the parties were still working at the close of the workshops toward consensus on certain SGAT definitions, and that the agreed upon definitions should be included in the most recent SGAT. The Commission agrees that the SGAT should be updated with any definitions or other terms on which Qwest and the CLECs were able to agree. Second, the Commission approves the clarifying language proposed by AT&T for Section 5.12.2 of the SGAT addressing the effect of the sale of exchanges by Qwest. AT&T recommended the word "unaffiliated" be stricken in its reference to the parties to which Qwest may transfer an exchange. In addition, AT&T recommends that the phrase "completion of" be included in its reference to the timing for the notice required of a transfer. With these changes the first part of Section 5.12.2 is as follows:

In the event that Qwest transfers to any ~~unaffiliated~~-party exchanges including end users that a CLEC serves in whole or in part through facilities or services provided by Qwest under this SGAT, the transferee shall be deemed a successor to Qwest's responsibilities hereunder for a period of 90 days from notice to CLEC to completion of such transfer or until such later time as the Commission may direct pursuant to the Commission's then applicable statutory authority to impose such responsibility either as a condition of the transfer or under such other state statutory authority as may give it such power.

With these changes, the Commission approves and adopts the Facilitator's recommendations on the resolution of disputes for the SGAT general terms and conditions.

TRACK A

The term Track A refers to Paragraph A of Section 271(c)(1) entitled "Presence of a Facility's Based Competitor." That paragraph provides as follows:

A Bell Operating Company meets the requirement of this subparagraph if it has entered into one or more binding agreement that has been approved under Section 252 specifying the terms and conditions under which the Bell Operating Company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing provider of telephone exchange service (as defined in Section 3(47)(A), but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own

telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.

In his report, the Facilitator identified the four issues set forth by the FCC in evaluating the evidence on the requirements to satisfy Track A. The four issues are (1) whether the BOC has signed one or more binding agreements that has been approved under Section 252, (2) whether the BOC is providing access and interconnection to unaffiliated competing providers of telephone exchange service, (3) whether there are unaffiliated competing providers of telephone exchange service to residential and business customers, and (4) whether the unaffiliated competing providers offer telephone exchange service exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange facilities in combination with the resale of the telecommunication services of another carrier. Facilitator's Report p. 30. It is not necessary that competitor providers have achieved a specific market share before Track A can be satisfied. The Facilitator noted that "the FCC has already decided that it will not impose a market share test and it has deemed Track A to be satisfied at very low CLEC levels of penetration into the residential market." Facilitator Report at p. 35.

The Facilitator reviewed the evidence on each of the four Track A requirements and concluded that Qwest had not presented evidence to satisfy the third element. Specifically, the Facilitator stated that, at least for Idaho, "Qwest should be found to have not met Track A standards, for reasons of its failure to provide substantial evidence that competitors were serving residential end-users." Facilitator's Report p. 3.

Qwest requested an opportunity to supplement the record to demonstrate the existence of competitor providers for Idaho residential customers, and the Commission granted Qwest's request in Procedural Order No. 28866. Qwest subsequently filed supplemental evidence consisting of affidavits and documentation to demonstrate competition in some residential markets in Idaho. The supplemental evidence indicates that Leap Wireless, a facilities based broad-band PCS carrier is offering its "Cricket" brand wireless service as a substitute to wireline local exchange service. In addition, Qwest's supplemental information identifies McLeod Telecommunications and Project Mutual Telephone Company as providing residential services that satisfy the requirement of actual competitive residential services for Track A approval.

Written comments were filed regarding the Track A requirements by Qwest, AT&T and the Commission Staff. AT&T's comments in part are specific to Montana and Wyoming. The only issue it identifies for a more general application is regarding the method for estimating CLEC facilities based line counts. That issue was presented to and fully considered by the Facilitator, and the Commission approves the resolution in the Facilitator's report.

In its written comments Staff stated that, despite the supplemental information provided by Qwest, it still has reservations regarding the level of residential competition in Idaho. Staff identified the lack of established prices for Qwest's unbundled network elements as a possible explanation for a relatively low residential penetration level by CLECs. Staff stated it "is not convinced the record demonstrates that Qwest has fully and irreversibly opened the local telecommunications market to competition for residential customers." Staff October 20, 2001 Comments p. 7. Staff revisited the issue of market penetration in later comments, however, after Qwest filed its supplemental information. After noting that the existence of competition in the residential telecommunications market in Idaho is "de-minimus," Staff nonetheless stated, "based upon the guidelines established by the FCC, Qwest seems to have met its obligation [under Track A] and Staff therefore recommends this matter be considered closed." Staff November 1, 2001 comments p. 9.

The Commission is aware, and the Facilitator noted, that the FCC has not determined a specific market share of residential service by competitors must exist in order to satisfy Track A. By the language of the Track A paragraph, it is enough if there is even one approved interconnection agreement by which Qwest "is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service...to residential and business subscribers." The Commission finds that the supplemental information filed in the record by Qwest establishes the presence of a provider providing service to residential and business customers in Idaho. The Commission accordingly finds that Qwest satisfies the Track A requirements.

SECTION 272: SEPARATE AFFILIATE REQUIREMENTS

Section 272 of the Telecommunications Act requires a BOC to provide interLATA services, once approved, through affiliate entities separate from the BOC. This section thus imposes significant structural safeguards to the BOC's provision of interLATA services. The Facilitator summarized the Section 272 requirements for Qwest as follows:

1. Qwest must provide in-region interLATA service through an affiliate that is separate from Qwest Corporation, the BOC;
2. The separate affiliate must maintain books, records and accounts in the manner prescribed by the FCC, which must be separate from books, records and accounts maintained by Qwest;
3. The separate affiliate must have separate officers, directors and employees from those of Qwest;
4. Transactions between the affiliate and Qwest must be conducted on an arms length basis with any such transaction reduced to writing and available for public inspection;
5. Qwest may not discriminate in favor of its affiliate in any dealings between the two entities;
6. Qwest must account for all transactions with its affiliate in accord with FCC accounting principals.

Qwest has designated Qwest Communications Corporation (QCC) as the Section 272 affiliate. QCC is wholly-owned by Qwest and is the entity through which Qwest provided interLATA services prior to its merger with U S WEST Communications.

In his report the Facilitator reviewed the evidence on each of the requirements contained in Section 272. The Facilitator identified significant problems in the requirements that Qwest maintain separate books and records for the affiliate. The Facilitator therefore recommended that Qwest be required to arrange for an independent review, covering the period from April to August of 2001, to determine:

- (a) whether there has been adequate action to assure the accurate, complete, and timely recording in its books and records of all appropriate accounting and billing information associated with Qwest/QCC transactions,
- (b) whether the relationship between Qwest as a vendor or supplier of goods and services and QCC has been managed in an arms-length manner, including, but not necessarily limited to a consideration of what would be expected under normal business standards for similar contracts with an unaffiliated third party, and
- (c) whether there are reasonable assurances that a continuation of the practices and procedures examined will continue to provide a level of

accuracy, completeness, timeliness and arms-length conduct found in examining the preceding two questions.

Facilitator's Report p. 14. Except for the booking of certain transactions identified by the Facilitator, the Facilitator concluded that Qwest has satisfied each of the separate affiliate requirements of Section 272.

In response to the Facilitator's recommendation, Qwest asked KPMG to provide the additional review and then filed KPMG's supplemental report on November 15, 2001. The KPMG report summarized the transactions it reviewed for the designated period to determine whether accounting for the transactions complied with Section 272 and associated FCC rules and regulations. KPMG noted several instances where Qwest did not comply with the FCC's affiliate transaction pricing rules, did not properly process accounting entries and affiliate billings, and did not reduce to writing certain services provided between Qwest and QCC. Except for the instances noted, KPMG concluded that Qwest had complied, in all material respects, with the Section 272 accounting requirements for the period from April 1, 2001 to August 31, 2001.

Along with the supplemental KPMG report, Qwest filed affidavits of accounting employees providing explanations for the discrepancies noted by KPMG, and asserting that corrective action had been or would be taken by Qwest. For example, the affidavit of Judith L. Brunsting states that Qwest corrected all of the identified discrepancies, and that QCC "has also implemented and is in the process of implementing several new internal controls intended to provide reasonable assurance that inter-company transactions initiated by the 272 affiliate are identified, reduced to writing, accurately processed and posted." Based on the KPMG report and representations by Qwest, Staff asked that Qwest perform a follow-up review by an independent third party to verify that the discrepancies identified in the report had been properly booked and that the corrective steps had actually been implemented. Qwest stated at oral argument its agreement to the additional review, Tr. p. 134-135, and subsequently filed a follow-up review by KPMG on December 19, 2001.

Staff in its written comments did not make a specific recommendation regarding Qwest's compliance with the Section 272 separate affiliate requirement. Staff concurred with the recommendation made by the Facilitator that the follow-up review be conducted by KPMG, and expressed some frustration in its written comments that Qwest had complicated the